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Study on the extractive industries in Mexico and the situation of indigenous peoples in the territories in which those industries are located

Note by the Secretariat

Pursuant to a decision of the Permanent Forum on Indigenous Issues at its tenth session (see E/2011/43 and Corr.1, para. 57), Saúl Vicente Vásquez, a member of the Forum, conducted a study on the extractive industries in Mexico and the situation of indigenous peoples in the territories in which those industries are located. The report is hereby transmitted to the Forum at its twelfth session.

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Study on the extractive industries in Mexico and the situation of indigenous peoples in the territories in which those industries are located[1]

I. Introduction

1. In the course of this study, the Mexican authorities were contacted in order to obtain first-hand information on mining companies in Mexico and to learn their views on the impact of those companies in the territories of indigenous peoples. In that regard, I would like to thank the Ministry of Foreign Affairs for its good offices in organizing meetings with the Ministry of Economic Affairs. I am also grateful to the Ministry of Economic Affairs for the interviews with its representatives and for the meetings it set up with the representatives of several extractive companies, the Mexican Chamber of Mines (CAMIMEX) and the Association of Mining Engineers, Metallurgists and Geologists of Mexico. I wish to extend thanks to the National Commission for the Development of Indigenous Peoples (CDI) for its input on the subject. This report refers primarily to the mining industry, since the indigenous peoples of Mexico have expressed to the Forum their continued concerns regarding the activities of that industry in its territories.

2. In preparing this report, I interviewed in person the representatives of indigenous peoples and organizations who expressed their views and concerns about the activities of mining companies and the impact that they have on their communities.

3. As part of the study, I submitted a questionnaire to the Ministry of Economic Affairs and to CAMIMEX. Regrettably, I received no official response, as a result of which a number of questions remain unanswered.

4. In my interviews with representatives, I found that institutions maintained an open attitude. With the Ministry of Economic Affairs, I discussed the continuation of dialogue through interministerial meetings and the identification of the territories of indigenous peoples that were specifically affected by mining concessions – a process which has yet to be completed. CAMIMEX and a few extractive companies also have yet to conduct on-site visits and to identify so-called "good practices". They maintain that the extractive sector is one of the most dynamic in Mexico and contributes significantly to the country's balance of trade; it offers workers the highest salaries and carries out its activities in a sustainable manner, in compliance with the environmental standards and international codes of conduct established for such industries.

5. At the same time, the indigenous communities I met with claim that the Mexican authorities have failed to observe and protect their rights as enshrined in the Mexican Constitution and international legal instruments; and that they have failed to seek the participation of indigenous communities in consultative processes and to obtain their free, prior and informed consent before granting concessions and permitting such companies to operate in their territories. In addition, indigenous communities claim that their protests have been criminalized and are often punished

[1] The author would like to extend gratitude to Mr. Nemesio Rodríguez of the university programme *México, Nación Multicultural* for his generous assistance in the preparation of this report.

with acts of violence, including the murder of their leaders. They say that they have suffered the loss of their natural resources, negative impacts on the environment, and health problems as a result of the processes used to extract metals and that they have not benefited from extractive industries.

II. Historical background

6. Mining in Mexico dates back to pre-Hispanic times and the works of Fray Toribio de Benavente (Motolinía) and Fray Bernardino de Sahagún show that Mexican indigenous peoples were familiar with the production of castings, using the technique known today as lost wax casting. The conquistadores also found bronze alloys, which they referred to as "hard copper". Clavijero believed that the extreme toughness of hard copper was the result of a special tempering process and Guillermo Dupaix, who was of the same opinion, travelled to then-New Spain in 1806 and found metal pieces in Oaxaca which he referred to as "red copper chisels".[2] These metals were traded, along with gold, jade, copper, cacao and cotton by indigenous peoples before colonization.[3]

7. Based on these findings and the discovery of rich deposits of such minerals in the colonial era, the conquistadores strongly promoted mining, thus robbing indigenous peoples of their resources. The peak of mining began around 1530 with the gold cycle; beginning around 1540 — the start of the silver cycle — attempts were made to regulate mining to ensure continued control by the Spanish Crown. Such efforts resulted in various mining orders and laws, including for the minting of new coins with the establishment of the Mexican Mint (Casa de Moneda) in 1535.

8. During the first half of the twentieth century, mining reached a new peak, marked by three historic phases: the Porfiriato; the Revolutionary Movement of 1910 and the Constitution of 1917; and the period following the international economic crisis of 1929.

[2] Fray Toribio de Benavente (Motolinía), Historia de los Indios de la Nueva España, Porrúa, 1979. Fray Bernardino de Sahagún, Historia General de las Cosas de Nueva España: Editorial Porrúa, Mexico City, 1999.

[3] Miguel León-Portilla, Rostro y corazón de Anáhuac, Mexico City, Editorial SEP, Cámara Nacional de la Industria Editorial y Asociación Nacional del Libro, A.C., 2001.

III. Legal framework for the rights of indigenous peoples and extractive industries

9. A number of international legal instruments[4] recognize the rights of indigenous peoples: the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) is considered the recognition of those peoples' historical claim to a legal instrument that protects their rights. It is a framework that recognizes the minimum standards for the dignity, survival and well-being of indigenous peoples; the Declaration and the Indigenous and Tribal Peoples Convention (No. 169) of the International Labour Organization (ILO) are the two instruments that best reflect the aspirations and the recognition of the rights of indigenous peoples.

10. Mexico has ratified ILO Convention No. 169 and adopted the Declaration and therefore has a duty to comply with its obligations under these legal instruments and the other international human rights laws and agreements that affirm and safeguard the rights of indigenous peoples which it has adopted.

11. With regard to the mining extractive industries, it is essential to consider the right of indigenous peoples to self-determination, in particular, their right to be consulted and to participate in decision-making; the obtaining of their free, prior and informed consent where relevant; and the protection of their lands, territories and natural resources.

12. The right to self-determination is affirmed in article 3 of the Declaration and in article 1 of the international covenants on human rights of 1966. By virtue of this right, indigenous peoples freely determine their political status and freely pursue their economic, social and cultural development.[5] For this to be possible, it is crucial to recognize their vital space, or territory. Article 26 of the Declaration states that indigenous peoples have the "right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use".[5]

13. With regard to participation and consultation, the Declaration contains "more than 20 provisions affirming indigenous peoples' right to participate in decision-making".[6] In particular, articles 19 and 32 of the Declaration affirm that right of indigenous peoples and the obligation of States to obtain their free, prior and informed consent.[5]

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[4] Universal Declaration of Human Rights; Indigenous and Tribal Populations Convention (No. 107) of the International Labour Organization; Convention on the Prevention and Punishment of the Crime of Genocide; International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Rights of the Child; Convention on Biological Diversity; para. 20 of the Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights held in 1993; Declaration on Permanent Sovereignty over Natural Resources; Convention on the Elimination of All Forms of Discrimination against Women; general comments No. 20 and No. 21 of the Committee on Economic, Social and Cultural Rights; general comment No. 25 of the Human Rights Committee; and regional instruments and jurisprudence, such as the rulings of the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, and the African Charter on Human and Peoples' Rights.

[5] General Assembly resolution 61/295.

[6] A/HRC/EMRIP/2010/2, para. 8.

14. ILO Convention No. 169 provides for the consultation and full and effective participation of indigenous peoples — rights that constitute, according to the Expert Mechanism on the Rights of Indigenous Peoples, the cornerstone of the Convention.[7] It is important to note the obligation of States to institutionalize the procedures for participation (arts. 2 and 33), as well as articles 6, 7 and 15, which establish the general framework for ensuring consultation and participation and for reaching agreement and obtaining the consent of indigenous peoples.

15. In the part on land (arts. 13 to 19), Convention No. 169 sets out the responsibility of States to respect and protect the lands and territories of indigenous peoples, including natural resources. Article 15, paragraph 1, states that indigenous peoples also have the right to participate in the management and conservation of these resources. Paragraph 2 stipulates that "[i]n cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands".[8]

16. Mexico has adopted a number of national texts recognizing the rights of indigenous peoples and legal instruments that define land ownership as well as the mechanisms for setting up mining companies.

17. Article 1 of the Political Constitution of the United Mexican States provides that "all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights".[9]

18. Article 2 recognizes the right of indigenous peoples to self-determination so that they may, inter alia: "have preferential use of the natural resources of the sites inhabited by their indigenous communities, except for the strategic resources defined by this Constitution. The foregoing rights shall be exercised respecting the forms of land ownership and tenure as established in this Constitution and in the laws on the matter as well as respecting third parties' rights. To achieve these goals, indigenous communities may form partnerships under the terms established by the law".[10]

19. Articles 18, 27 and 115 of the Constitution recognize certain rights of indigenous communities and peoples. Furthermore, Mexico has a vast body of laws governing matters related to indigenous peoples.[11]

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[7] Ibid., para. 17. See also A/HRC/12/34, paras. 38 and 39.

[8] ILO Convention No. 169, http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO.:P12100_ILO_CODE:C169#A13

[9] Political Constitution of the United Mexican States, Spanish version available from http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf.

[10] Ibid., art. 2, part A, para. VI, p. 2.

[11] Federal Code of Civil Procedure; Federal Code of Criminal Procedure; Federal Criminal Code; Act on the Treatment of Juvenile Offenders for the Federal District for Ordinary Crimes and for the Entire Republic for Federal Crimes; Act establishing the Office of the Attorney-General; General Education Act; Federal Copyright Act; Agrarian Act; General Act on Ecological Balance and Environmental Protection; General Act on Sustainable Forestry Development; General Act on Social Development and General Act on Sustainable Rural Development.

20. There are also two agencies specifically tasked with developing and establishing standards and implementing public policies relating to indigenous peoples: the National Commission for the Development of Indigenous Peoples (CDI) and the National Institute of Indigenous Languages (INALI).

21. The legislation governing mining activity in Mexico is set forth in: the Constitution, the Mining Act, the General National Property Act, the Agrarian Act, the General Act on Ecological Balance and Environmental Protection, the General Law for the Prevention and Comprehensive Management of Wastes, the National Waters Act, the Foreign Investment Act, the Federal Act on Rights, the Federal Civil Service Organization Act, the Civil Code, the General Health Act, the General Act on Sustainable Forestry Development and the Natural Heritage and Biodiversity Act.

22. Article 27[12] of the Constitution provides that ownership of all land and water within national territory is vested originally in the nation, which has the right to transfer this ownership to individuals. It recognizes the following categories of land ownership: social ownership recognized in the form of cooperative landholdings (*bienes ejidales*) and communally held lands; private property; and national property.

23. Article 27 stipulates that individuals shall not be granted natural resources, as is the case in mining; indeed, as the fourth paragraph expressly states, the nation retains direct ownership over such resources.

24. However, the sixth paragraph of that article establishes that the nation's ownership is inalienable and indefeasible and that the exploitation, use or development of the resources in question by individuals or by companies incorporated under Mexican law shall not be allowed except through concessions granted by the federal Government.[13]

25. In accordance with the Mining Act, the Ministry of Economic Affairs is responsible for granting concessions. While the aforementioned laws regulate mining in one way or another, the Mining Act is the main legislative text relating to and defining this activity. Article 6 stipulates that "the exploration, exploitation and extraction of the minerals or substances referred to in this Act are of public interest and will have priority over any other use or development of the land, subject to the conditions established herein, and taxes may be assessed on these activities only by federal law".[14]

26. Other laws substantiate the notions of "public interest" and "priority" with regard to mining and the measures adopted to help individuals acquire lands with mining rights. Such laws include the General National Property Act (arts. 6 and 9), the National Waters Act (arts. 7 and 7 bis), and the Federal Act on Rights (art. 224). The Agrarian Act and the Civil Code establish mechanisms for the buying and selling or leasing of both private and socially owned land.[15]

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[12] The Constitution, art. 27, paras. 1 to 4.

[13] Ibid., art. 27, para. 6.

[14] Mining Act, art. 6, Spanish version available from www.diputados.gob.mx/LeyesBiblio/pdf/151.pdf

[15] Francisco López Bárcenas and Mayra Montserrat Eslava Galicia, *El mineral o la vida: la legislación minera en México*, COAPI, Mexico, 2011.

27. In the interpretation of "public interest", "priority" and the protection of the rights of indigenous peoples, the Supreme Court observed:

> The 'principle of public interest', in a generic sense, covers three specific considerations: 'public interest' sensu stricto, or when the expropriated property is directly used for a public service; 'social interest', which is characterized by the need to satisfy immediately and directly a given social class and eventually the whole community; and 'national interest', where the country's needs must be met and measures must be adopted to address situations that affect it as a political and international entity.[15]

28. With regard to indigenous peoples, the Mining Act recognizes that precedence be given to requests from indigenous peoples or communities, provided that they meet the conditions and requirements provided for in the Act, one of which is "matching the best financial offer tendered by another bidder".[16] This effectively nullifies the preferential right that the Constitution gives to indigenous peoples, who are unlikely to have the financial and technical resources to outbid large multinational or national corporations, should they attempt to do so. It also nullifies their right to consultation and consent as guaranteed in the international legal instruments signed by Mexico.

IV. Analysis of extractive industries and their impact on the indigenous peoples of Mexico

29. Mining, because of its diversity and abundance, has always been a major economic activity for Mexico; it continues to be important for the country's industrial development, particularly in the oil, iron and steel, chemicals, glass, electronics and construction industries.

30. It is argued that the exploitation of mineral resources guarantees the economic development of the country. According to the Ministry of Economic Affairs, mining in Mexico is currently "the third most successful industry in terms of attracting investment — behind the oil industry and automotive and electronic exports — thus surpassing the tourism industry. In 2011, $4.7 billion were invested in the sector, resulting in the direct creation of 307,000 jobs and the indirect creation of 1.5 million jobs."[17]

31. Unlike at the turn of the previous century, Mexican society as a whole now sees mining as a source of conflict. In broad terms, there are three groups: those who are against mining for various reasons (related to the environment, land protection, sociocultural considerations or a combination of all these); those who support mining on the basis of economic and legal arguments (job creation, local and regional economic growth, attraction of increased investment and compliance with regulations in order to obtain land concessions through the competent authorities); and the large majority of the population, who receive incomplete and biased information from both sides through the mass media and who do not take a particular stance. In general, there is no dialogue between the two interest groups,

[16] Mining Act, art. 13, para. 3, and art. 13 bis, section III, para. 2.

[17] Interview with María Jimena Valverde, General Coordinator of Mining, Office of the Deputy Minister for Industry and Commerce, Ministry of Economic Affairs, 13 January 2012.

the opponents and proponents maintaining quasi-fundamentalist positions on the issue.

32. Mining and mining products are a fundamental part of daily life in rural and urban areas alike and no one is really prepared to eschew such products.

33. The mining boom in Mexico is part of a general global trend that affects Latin America in particular.[18]

34. Whether or not they have a history of mining, countries in Latin America and the Caribbean (with the exception of Cuba) have reformed their laws and administrative regulations to encourage and attract capital for investment in mining, as is the case in Central America and in Peru.[19] In the region, there are countries with strong State-owned companies that are active in national and international mining markets (Codelco in Chile, Comibol in the Plurinational State of Bolivia, CVG and CVG Minerven in the Bolivarian Republic of Venezuela and Enami in Ecuador), whereas in Mexico, there is a total absence of the State in this sector.[20]

35. In Mexico, 51.6 per cent of the continental land area is legally under the regime of social ownership (comprising cooperative landholdings, communally held land and the territorial homes of indigenous populations), 37.1 per cent is in the hands of small landowners (that is, it is private property, on which indigenous people also live) and 11.3 per cent is publicly owned (and also home to indigenous people).[15] Given that 70 per cent of the national territory has mining potential and that half of it is socially owned,[21] the areas in which the mining industry and indigenous peoples come into contact are growing, as is the potential for conflict in those areas.

36. CAMIMEX claims the priority granted to mining activity by law on an issue central to the development of mining companies: land tenure. Its arguments are based on the Mining Act, in which it is established that mineral exploitation takes precedence over any other use or development of the land. In practice, however, disputes with those living on the land (on cooperative landholdings and communally held land) are frequent and have put the industry in a very difficult position in recent years, with investments and the start of many projects delayed as a result of the legal proceedings.[22]

37. For his part, Kevan Cowan, President of Toronto Stock Exchange Markets and Group Head of Equities, TMX Group, Canada, observes that difficulties associated

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[18] The website of the programme *México, Nación Multicultural* at the National Autonomous University of Mexico has a link to a database on mining megaprojects in areas traditionally occupied by indigenous and black peoples in Latin America, www.nacionmulticultural.unam.mx and www.mezinal.com.mx/mineria.php.

[19] In 2004, 15 per cent of the land in the Peruvian Amazon was leased to mining companies; in 2010, that number rose to 75 per cent, with 5,812 concessions and a loss of 1.5 million hectares of Amazon rainforest (Richard Chase Smith of Peru's Instituto del Bien Común, www.elcomercio.pe). The Confederación Nacional de Comunidades del Perú Afectadas por la Minería reports that 72 per cent of the national territory is leased to multinational extractive companies (www.conacami.pe/).

[20] Juan Luis Saricgo Rodríguez, "La minería mexicana: el ocaso de un modelo nacionalista", *Apuntes*, No. 68, Centro de Investigación de la Universidad del Pacífico (2011).

[21] Martín Cuadra, "Minería mexicana: 'perforadora de autonomía'", www.ecoportal.net/, 27 March 2012.

[22] Interview conducted by the author with CAMIMEX on 2 April 2012.

with land tenure and property rights are "one of the biggest problems in Mexico for the establishment of mining companies and projects".[23]

38. Between 2000 and 2010, a total of 26,559[24] mining concessions were granted in Mexico, the equivalent of 35 per cent of the national territory.[15] In 2010, mining projects were carried out by 301 companies, with the following countries of origin, in order of importance by number of projects: Canada (202),[25] United States of America (51), Mexico (14), Australia (7), China (7), Japan (6), United Kingdom of Great Britain and Northern Ireland (4), Peru (2), the Republic of Korea (2), Chile (2), Italy (2), Belgium (1) and India (1).[26] With regard to the share of gold and silver production of different sizes of company, large mining companies accounted for 94.49 per cent of gold and 95.07 per cent of silver on the market in 2009. Most conflicts involving large companies are with the miners' trade union and are related to collective agreements, salaries and benefits. These large foreign companies represent 85 per cent of investment in the sector and are mostly located in traditional mining areas of the country (Sonora, Durango, Zacatecas, Chihuahua and San Luis Potosí).[20]

39. Medium-sized mining companies account for 5.29 per cent of gold and 4.79 per cent of silver production and include what are known as "junior" or "Canadian" companies, even though not all of them are Canadian. These companies "have two distinctive characteristics: (a) their ephemeral nature, which results from the intensive exploitation model they apply; and (b) their position on what might be described as the third frontier of Mexican mining, and their use of technologies which generate considerable environmental liabilities and trigger conflicts among the affected populations". They establish camps in "isolated areas cut off from the rest of the country" which the national companies avoid because of the high production costs. These areas are the Sierra Madre Occidental and the mountains of Guerrero, Oaxaca, Chiapas, Puebla, Michoacán and Veracruz, i.e. indigenous areas in which the rates of social exclusion and poverty are high and there is little or no State presence.[20] The small mining sector, which consists of individuals or families rather than companies, accounts for 0.22 per cent of gold and 0.14 per cent of silver production, and generates no social conflict of significance.[20]

40. In the conflicts caused by the territorial expansion of "junior" mining companies, different ways of seeing and experiencing the world, namely use value and exchange value, are pitted against each other. From the Rio Bravo to Tierra del Fuego, disputes are arising because of the incompatibility between short-term speculative mining activity and the existential long-term approach of local and regional populations; between mining on the one hand and farming, silvopasture and fishing on the other; between the limited generation of jobs leading to local social disparities and the social, cultural, economic and environmental backwardness caused when the company withdraws. To the above must be added, in all cases, the inadequate and scarce information about the mining project received by the local

[23] Mario Martínez Ramos, "El dominio del territorio nacional y las empresas mineras canadienses", *El Tejolote*, November 2011.

[24] 27,000 concessions were in force for 2011, according to the Ministry of Economic Affairs.

[25] María Jimena Valverde, General Coordinator of Mining, states that "of those 283 foreign companies, 215 are Canadian, because we as a country are the Toronto Stock Exchange's third-largest destination".

[26] Ministry of Economic Affairs, Directorate-General of Mining Development, http://portalweb.sgm.gob.mx/economia/es/mineria-en-mexico.html.

populations. This inadequate information increases the suspicion on both sides, which is deepened by the lack of institutional mechanisms to guarantee the legitimacy of agreements, even formal and legal ones. It is also very common for companies to establish negotiations with the wrong members of the local population. It is in this relational climate that socioeconomic, sociocultural and socioenvironmental conflicts arise and that the State has shown itself to have little or no ability to protect and uphold the peoples' collective rights, sometimes because of a lack of knowledge on the part of the institutions themselves.[27] "Differences of culture and ways of thinking among the actors (the states, the mining companies, the communities, etc.) represent a great challenge not only to dialogue and ad hoc negotiations in conflict situations but also to the construction of a common interest, which is the basis for the formulation of public policy."[28]

41. One cause of conflict between "Canadian" mining companies on the one hand and local associations and environmental groups on the other is environmental liabilities. These are "solid or liquid waste, generally harmful to the environment or human health, which are left behind as residues of mining activity".[29] The risk entailed by such liabilities and their potential impact are proportional to the scale of the project. Moreover, the extent to which that risk is controlled is related not only to the quantity and quality of the information provided to the local community so that it can take decisions but also to the financial and technical safeguards which the companies put in place and which they undertake to apply under the State's rules and effective supervision. In other words, if the mining industry is to act responsibly towards the environment and the indigenous population in the areas in which it carries out its activities, the State must be proactively and consistently present. Inconsistencies within the legislation must not be permitted, nor must the institutions implementing the legislation be operating below the required level. The Latin American Mining Conflict Observatory (OCMAL) has detected 164 mining conflicts in 17 Latin American countries, with 228 communities affected. The largest number of conflicts are in Peru (29), Brazil (28), Chile (27), Argentina (25) and Mexico (19).[30] There are thought to be more than 200 environmental conflicts in Mexico related to natural resource exploitation processes.[21]

42. In 2011, in the La Montaña region of the state of Guerrero, helicopters of the Camsim mining company were observed carrying out prospecting activities. It soon emerged that 22 mining concessions had been granted to private companies without any inhabitant of the region having been informed.

43. The companies arrived in La Montaña with the aim of completing work on the concessions for 42 registered deposits, notably the La Diana concessions, measuring 15,000 hectares, which would affect the communities of Paraje Montero, Zitlaltepec, Iliatenco and Malinaltepec, and three concessions known as Corazón de las Tinieblas (Heart of Darkness), measuring more than 45,000 hectares, which affect more than eight farms and municipalities in the vicinity of Zapotitlán Tablas, Potoichán and Acatepec.

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[27] The General Coordinator of Mining stated that "if there are conflicts with communities, it must be ascertained which of those communities are indigenous; I have many conflicts in the Guerrero mountains, but are they indigenous? I don't know."

[28] Clotilde Gouley, "Conflictos mineros, interculturalidad y políticas públicas", Centro Bartolomé de las Casas/Consorcio de Investigación Económica y Social, Cusco, 2005, http://cies.org.pe.

[29] Consuelo Infante, *Pasivos ambientales mineros: barriendo bajo la alfombra*, Latin American Mining Conflict Observatory (OCMAL), 2011, www.conflictosmineros.net.

[30] OCMAL, www.conflictosmineros.net.

44. Half of the concessions are in territory which for 16 years has been supervised by the Policía Comunitaria and Coordinadora Regional de Autoridades Comunitarias (CRAC). Joining the struggle are groups from the region, such as Tlachinollan, Procesos Integrales para la Autogestión de los Pueblos (PIAP), the Xochistlahuaca community, various community radio stations, the Diocese of Tlapa and other groups close to social movements, which have in a gradual and coordinated fashion held assemblies at which they have reaffirmed their opposition to mining. Part of the project is currently suspended, but the main concern of the communities represented by CRAC is a recent proposal to make the area into a "biosphere reserve" as an alternative, because, they claim, the mining companies would thus be able to continue with their exploration projects. They also argue that their rights under article 2 of the Constitution, international legal instruments on indigenous rights and Act No. 701 of the state of Guerrero, which stipulates that communities with between 40 and 60 per cent indigenous population must be consulted on such projects, have been violated.[31]

45. In the state of Oaxaca in 2006, the company Continuum Resources started mineral exploration near the Zapotec community of San José del Progreso, in the Ocotlán valley, making use of the concessions granted by the Mexican federal Government.

46. In 2008, the Canadian company Fortuna Silver Mines Inc. bought Continuum's concessions and started dynamiting in preparation for the construction of an access ramp for large-scale gold and silver exploitation. The site's preparatory phase took place in 2010, with exploitation beginning in 2011. The latter phase will last at least 12 years, with approximately 1,500 tons of minerals processed every day. The company needs an enormous quantity of water, which will remain saturated with toxic chemicals and will contaminate water tables throughout the region.

47. The Coordinadora de Pueblos Unidos del Valle de Ocotlán (CPUVO), which is fighting to defend the local peoples' land and territory, is opposed to this megaproject on the grounds that the mining company is stripping them of their lands and has established itself, in accordance with the concession granted to it, in an area covering part of their territory, which means that consultations must be carried out and that the community's free, prior and informed consent must be obtained.

48. During an interview, representatives of CPUVO stated that leases and, in some cases, land endowment contracts had been concluded with the company Cuzcatlán (a subsidiary of Fortuna Silver Mines Inc.) by means of intimidation and that the whole process had been conducted without having properly consulted or obtained the free, prior and informed consent of the community.

49. This provoked a conflict between a group of farmers on cooperative landholdings, which formed CPUVO, and another group, known as the Asociación Civil San José Defendiendo Nuestros Derechos, which, according to the interviewees, was founded with the support of the mining company and is led by the former mayor of San José del Progreso. The interviewees further alleged that this

[31] Meeting held with the Policía Comunitaria and Coordinadora Regional de Autoridades Comunitarias (CRAC) in San Luis Acatlán (Guerrero, Mexico) on 24 November 2012. See also Act No. 701 recognizing the rights and culture of the indigenous peoples and communities of the state of Guerrero, http://i.guerrero.gob.mx/uploads/2012/07/24-Ley-701-RecDerCultura-Ind.pdf, arts. 68 to 72.

association was an armed group that intimidated and threatened the local people, causing them to fear for their lives. Shortly after the interviews, two of the leading participants were killed by armed assailants. The conflict has spread to other communities from which the company wants to draw water for its activities. There are now calls for its concession to be abrogated.[32]

50. During the interview with CAMIMEX, its representatives stated that, even where codes of conduct existed, companies did not necessarily abide by them.[33]

51. Mining companies' use of water, specifically the quantity and the quality of wastewater, is a recurrent issue. The arguments advanced are as follows: 80,000 litres of water are needed to extract a ton of copper and 1,000 litres of water are needed to produce gold (which also requires moving at least a ton of rock);[34] producing one ounce (31 grams) of gold generates an average of 79 tons of toxic waste;[29] and the leaching process contaminates the river downstream with cyanide. It must be understood that environmental liabilities are not only a question of risk and impact, but also one of liability, involving a loss of assets for the countries where the work is carried out, as well as for the communities and ecosystems affected by mining activity.

52. Concern about the relationship between indigenous peoples and extractive industries in Mexico has reached the United Nations: the Committee on the Elimination of Racial Discrimination has expressed its "deep concern at the growing tensions between outsiders and indigenous peoples over the exploitation of natural resources, especially mines".[35] A landmark case in Mexico, because it concerned the expropriation of sacred land from an indigenous people, is that of Wirikuta in Real del Catorce (San Luis Potosí), a seasonal pilgrimage site for the Huichol people from Jalisco, Durango and Nayarit. The main ceremonial area, Cerro Quemado, is within the Protected Natural Area and Natural Sacred Site, which covers 140,000 hectares. Within this area, 76 mining concessions were granted to Universo, owned by Revolution Resources Corporation, and to Real Bonanza, a subsidiary of First Majestic Silver Corp., covering a total of 98,000 hectares, 70,000 of which are within the Wirikuta site. The Frente en Defensa de Wirikuta Tamatsima Wahaa, established in December 2010, brings together indigenous, civil, church and university associations that oppose the plunder of natural resources both in Mexico and abroad. On 27 February 2012, the federal judiciary ordered the temporary suspension of Real Bonanza's mining project, La Luz. This abeyance won the campaigners a respite and more time; it was also the first time that the judiciary defended an indigenous people against the mining companies.[36]

53. It is worth noting that this particular conflict is the only one recognized by the Mexican Ministry of Economic Affairs as a conflict with an indigenous people; it is,

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[32] Interview with CPUVO leaders on 17 December 2011. Bernardo Méndez was killed on 18 January and Bernardo Vázquez was killed a month later, near his community.

[33] "It is possible that some companies are failing [to comply]; if they have the data, they should provide us with it and we will gladly intervene." Interview with CAMIMEX on 2 April 2012.

[34] Guadalupe Rodríguez, "Minería, crecimiento económico y consumismo: ¿no hay otra alternativa?", by Agência de Informação Frei Tito para América Latina (ADITAL), www.adital.org.br/, 15 March 2012.

[35] CERD/C/MEX/CO/16 and 17, para. 17.

[36] Frente en Defensa de Wirikuta Tamatsima Wahaa, http://frenteendefensadewirikuta.org/wirikuta/; Angélica Enciso, "Ordenan a mineras suspender actividades en la zona sagrada de Wirikuta", *La Jornada*, 28 February 2012.

moreover, the only one in which the National Commission for the Development of Indigenous Peoples (CDI) has conducted a major consultation exercise to delimit the sacred site, which was done using georeferencing. As a result, the company agreed to hand over 761 hectares of its concession, which it acknowledged to be within the area of the sacred site.[37]

54. While "junior" mining companies argue that they create jobs, this is true only to a limited extent, as current mining technology requires fewer, but more highly qualified, employees than underground mining; this is why most of the employees come from outside the host regions or even the host country.[38] This is clearly the case in Oaxaca, where indigenous Zapotec from San José de Gracia have asserted that the company Golden Trump Resources has not kept all its promises, and that "there should be an arrangement in place to ensure that local people benefit the most and not simply in terms of job creation".[39] In order to expand their territories in Mexico in the first decade of the twenty-first century, these companies have relied on a favourable State and on the negligence of major national institutions responsible for indigenous issues and land tenure, such as CDI, the successor of the dismantled National Indigenous Institute (INI), and the Agrarian Prosecutor.

55. These federal institutions have failed to submit recommendations that would enable legislators to reconcile existing legislation with the obligation to hold binding, free, prior and informed consultations with indigenous communities on mining projects within their territories. Local, regional and national organizations, which have spoken out against what they consider to be extractive companies' unfair behaviour, have tried to impose limits on the territorial expansion of "junior" mining companies into socially owned land. The results, it must be said, have not always been positive because, rather than engaging as a serious partner, the Government has criminalized those organizations. This in turn has given rise to groups such as Movimiento Mesoamericano contra el Model Extractivo Minero (M4) in the area of the former Puebla Panamá Plan, Red Mexicana de Afectados por la Minería (REMA), and CPUVO.

56. On 1 December 2012, a new Executive took power in Mexico. In the light of this and anticipating changes, "Canadian" mining companies stated that no legislative amendments should be introduced that would entail a new system for granting and paying for concessions, and that priority should not be given to social or environmental issues. In that regard, Adam Graf, analyst and spokesperson for the American investment bank, Dahlman Rose, warned Mexico that it "should not change things" for the mining industry and should maintain the status quo, and Rob McEwen of McEwen Mining, based in Toronto (Canada), said that the new government should continue in the same way as past administrations.[40]

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[37] Interview with managers from the mining company First Majestic Silver, Real Bonanza, 2 April 2012.

[38] E. Tadeii, J. Seoane and C. Algranati, *Mineração Transnacional e Resistências Sociais na África e na América Latina*. Diálogo de los Pueblos and Grupo de Estudios sobre América Latina y el Caribe (GEAL), 2011, available from www.extractivismo.com; Mandeep Dhillon, "Canadian Mining in Mexico: Made in Canada Violence", Centro de Investigaciones Económicas y Políticas de Acción Comunitarias (CIEPAC), 10 May 2007.

[39] Statements made by Antonio Altamirano, Chair of the community Comité de Defensa de los Recursos Naturales, to the journalist Óscar Rodríguez.

[40] "Political point-scoring a risk to mine permitting in Mexico, analyst says", cited in Spanish by Minería al Día, 10 December 2012.

57. The Pact for Mexico, drawn up by the new President of Mexico and the main political parties, sets out various agreements that could change the situation, as it calls for the development of a national human rights programme, based on the treaties to which Mexico is a party; the recognition of indigenous communities and peoples as subjects of public law and interest; and the adoption of a new Mining Act that would revise the concessions system.[41]

V. Conclusions and recommendations

58. History has shown that, owing to the mineral potential of the land, the mining industry has been and continues to be important in Mexico. It has also been a strategic sector during various stages of the country's industrial development and is currently one of its most dynamic sectors.

59. Mexico has made some of the most significant progress in the Latin American region in respect of the rights of indigenous peoples, both in terms of its legislation and its institutions. The country seems well on its way to implementing the Declaration and other international instruments, particularly in view of the fact that article 1 of the Constitution[42] provides that all Mexicans shall enjoy the human rights recognized in international treaties. However, it is important to note that some articles in the Constitution[43] are contradictory, which has led to regulatory legislation that disregards the existence of indigenous peoples.[44]

60. At the same time, various sectors acknowledge that mining in the country generates conflicts, oftentimes owing to the absence of a procedure for consultation with indigenous peoples (Mexico has no legislation on this issue) and to obtain their free, prior and informed consent. At other times, conflicts arise owing to environmental problems, violations of collective labour contracts, a lack of knowledge among legislators who draft legislation on the rights of indigenous peoples or the lack of political will to ensure that consultations are carried out. Most controversies pertain to the activities of so-called "junior" or "Canadian" companies, owing to the intensive exploitation model they employ and their use of technology that incurs substantial environmental liabilities and incites conflicts in affected communities.

61. There is a will among the sectors involved in extraction projects, the federal authorities, entrepreneurs and indigenous organizations and peoples to develop legislation on indigenous rights, respect the rights of indigenous peoples and establish agreements to undertake those projects. Nevertheless, the intensity and growing number of conflicts and the criminalization of protest by those affected — which have led to loss of human life — are cause for concern, as they reflect the State's significant inaction in terms of guaranteeing and ensuring that the rights of indigenous peoples are respected and that national and transnational institutions and extractive companies fulfil their obligations.

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[41] See http://pactopormexico.org/.

[42] http://info4.juridicas.unam.mx/ijure/fed/9/.

[43] Article 2 recognizes "indigenous peoples", while article 27 refers to "indigenous groups".

[44] While article 106 of the Agrarian Act states that, "territories inhabited by indigenous groups shall be protected by the authorities, under the terms of legislation implementing article 4 and the second paragraph of section VII of article 27 of the Constitution", it makes no reference to indigenous peoples.

Recommendations

62. The Government of Mexico should:

(a) Resume interministerial meetings at the national level and invite the Permanent Forum on Indigenous Issues to support Mexico in addressing the issue;

(b) Pass a federal act on free, prior and informed consultation and consent in line with the international standards set out in the United Nations Declaration on the Rights of Indigenous Peoples;

(c) Bring its Constitution and legislation in line with international legal instruments on human rights and recognize indigenous peoples as subjects of public law, in particular in articles 2, 26, 27 and 115 of the Constitution;

(d) Review legislation concerning extraction methods and types of exploitation and amend the Mining Act, the National Waters Act, the Agrarian Act, the General National Property Act and the Federal Act on Rights with a view to including references to the rights of indigenous peoples, sustainable development and protection of the environment.

63. The federal authorities should fulfil their role as protectors of the rights of indigenous peoples; monitor the assumption of corporate social responsibility by companies; decriminalize the holding of protests by indigenous peoples against mining companies; and punish those responsible for crimes against indigenous leaders.

64. Extractive companies should fulfil their obligations to respect human rights, their own codes of conduct and the guiding principles of corporate responsibility.

65. CAMIMEX should develop mechanisms to ensure that indigenous peoples are consulted and give their prior, free and informed consent before exploration and exploitation begins.

66. There is no doubt that the Mexican Government will not develop coherent and inclusive public policy that respects the environment and indigenous peoples within the immediate time frame or with the urgent sense that communities are demanding. In that regard, as a transitional measure, activities currently under way could be assessed and relaunched.

67. Furthermore, it is recommended that the good practices submitted by the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the rights of indigenous peoples[45] should be considered as a framework for developing similar practices in Mexico. One example of such a measure is the significant operational and pragmatic framework being developed in Oaxaca by Grupo MCM.[46] While this type of approach does not solve the national problem of

[45] See A/HRC/EMRIP/2011/2, A/HRC/EMRIP/2009/5 and A/HRC/21/47.

[46] Through these initiatives, existing regulations are used to determine what mining concessions have been approved by a community; then, detailed, well-researched information on the mining project and its impacts is provided by means of community assemblies. If the community accepts the proposal, separate agreements (first on exploration and then, if the project continues, on exploitation) aimed at respecting the people's land use and customs are established. The agreements may be reviewed, reformulated or terminated, as determined by the community following its assessment of the project's impacts, including whether or not the provision calling for the majority of jobs created to be at the local level was implemented.

"junior" mining companies, it does address the industry's most significant environmental and social impacts, based on the assumption that mitigating and reversing the effects of mining operations conducted over the past ten years at the national level depends on other spheres of Government and on the political will to build public policy that guarantees indigenous people that Mexico will fulfil its international commitments to respect their collective and individual rights.